

1 ☐ **Wiretaps**

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2 ☐ **WIRETAPS**

■ Because of their intrusiveness, wiretaps are highly scrutinized and require that the procedures set forth by statute are precisely followed

3 ☐ **WIRETAP STATUTES**

■ A.R.S. § 13-3010
Arizona Wiretap Statute
■ A.R.S. § 13-3015
Arizona Emergency Wiretap Statute
■ Title III, 18 U.S.C. 2510
Federal Wiretap Statute

4 ☐

For the purposes of A.R.S. § 13-3010, "crime" means:

- Murder
- Gaming
- Kidnapping
- Robbery
- Bribery
- Extortion
- Theft
- An act in violation of chapter 23 of this title (Organized Crime, Fraud, and Terrorism)
- Dealing in narcotic drugs, marijuana or dangerous drugs
- Sexual exploitation of children in violation of chapter 35.1 of this title
- Or any felony that is dangerous to life, limb or property.

Crime includes conspiracy to commit any of the offenses listed in this subsection.

5 ☐ **Wiretap Benefits**

- 1 ☐ Wiretaps Can:
 - 2 ☐ ■ Dismantle/disrupt organizations
 - Provide longer prison terms
 - Provide intelligence and education into practices and organizational structure of criminal organizations in your area
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 - 3 ☐ ■ Seize substantial assets
 - Develop high-level informants
 - Provide large statistical numbers
 - There is a community based policing pitch
 - Regional or neighborhood impact
 - Public Perception
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- 6 ☐ **Wiretap Investigations**
 - 2 ☐ ■ Complex
 - Take Time
 - Require Lengthy Writing
 - Exhaust Resources
 - Cost Money
 - Require Flexibility
- 7 ☐ **Pre-Wire Investigation**
 - Make sure every search is legal
 - Make sure everything that has been done has been documented, regardless of whether it has been successful
 - Meet with your prosecutor to get input
 - Take away — treat every investigation as if it will result in a wiretap
- 8 ☐ **REQUIRED WIRETAP DOCUMENTS**
- 9 ☐ **AUTHORIZATION FOR THE APPLICATION**
- 10 ☐ **A.R.S. §13-3010: If Not the Elected Official, Attorney Must Be Designated In Writing**
 - A. On application of a county attorney, the attorney general or a prosecuting attorney whom a county attorney or the attorney general designates in writing, any justice of the supreme court, judge of the court of appeals or superior court judge may issue an ex parte order for the interception of wire, electronic or oral communications....
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- 11 ☐ **State v. Verdugo**
180 Ariz. 180 (App. 1993)
 - Facts: Defendant was one of 31 people charged in 81 drug related counts. He was charged with 5 counts. Based on interpreted calls, defendant, while an inmate in DOC

telephoned his brother in Phoenix to arrange for the delivery of drugs to the prison in Douglas.

- Defendant first argued that the AZ delegation statute was unconstitutionally broader than the federal statute because the federal statute does not include delegation language. Court relied on *Commonwealth v. Vitello*, 367 Mass. 224 (1975) to find that AZ's statute substantially complies with the federal statute and is therefore constitutional.

12 ☐ **State v. Verdugo (cont.)**
180 Ariz. 180 (App. 1993)

- Defendant also argues Authorization was inadequate.
- In *Vitello*, the court set out guidelines for implementation of its statute. It required:
 - Special designation be on a case-by-case basis only
 - Principle prosecuting attorney fully and fairly review the grounds asserted as warranting an order
 - The authority to apply be in writing

13 ☐ **State v. Verdugo (cont.)**
180 Ariz. 180 (App. 1993)

- Factors court considered in Verdugo
 - Assigned attorney advised elected official of:
 - Agency seeking the order
 - Crimes expected to be uncovered
 - General background of investigation and the reason for the wiretap request
 - Resources to be used in the investigation
 - The people to be investigated were an Hispanic family
 - The CA expressly delegated to his deputy the authority to apply for the order, as he does in each case

14 ☐ **State v. Verdugo**
Take Away

- Make sure the prosecution agency has procedures implemented to comply with Verdugo
 - AGO uses a memo to elected official
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15 ☐ **THE APPLICATION**

16 ☐ **State v. Salazar, 231 Ariz. 535, 537**
(App. Div. 1, 2013)

Facts: "The application consisted simply of a one-paragraph summary request for wiretap signed by the deputy county attorney. The application attached the affidavit of a deputy sheriff. In her application, the deputy county attorney did nothing more than provide her name, identify her authority to make the application, and ask that the court authorize a wiretap for the reasons stated in the affidavit of the deputy sheriff." ¶18

17 ☐ **State v. Salazar, 231 Ariz. 535**
(App. Div. 1, 2013)

Under A.R.S. § 13–3010(B)(2), the applicant must provide a “full and complete statement of the facts and circumstances relied upon *by the applicant*,* including the supporting oath or affirmation of the investigating peace officer of this state or any political subdivision of this state to justify the officer's belief that an order should be issued.”

* EMPHASIS IN ORIGINAL

18 ☐ **State v. Salazar, 231 Ariz. 535**
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* EMPHASIS IN ORIGINAL

19 ☐ **State v. Salazar:**
Applicant's Statement Must Include

- details of the offense(s) at issue;
- the identity of the person(s) who allegedly committed the offense(s) and whose communications will be intercepted; a description of the types of communications to be intercepted;
- and a description of the nature, identification and location of the place where the communication will be intercepted. A.R.S. § 13–3010(B)(2)(a)–(d).

20 ☐ **State v. Salazar:**
The Applicant Must Also Provide:

- a “full and complete statement as to whether other investigative procedures have been tried and failed” or why other procedures are unlikely to succeed or are too dangerous to undertake. A.R.S. § 13–3010(B)(3).
- identify the period of time the interception will take place. A.R.S. § 13–3010(B)(4).
- “a full and complete statement” of the facts regarding all previous applications involving the same persons, facilities or places. A.R.S. § 13–3010(B)(5).

21 ☐ **State v. Salazar, 231 Ariz. 535, 537**
Case Holding

The language of A.R.S. § 13–3010(B)(2) is clear. It requires a recitation of the facts relied upon by the applicant, “including” the oath of the investigating officer. The use of the term “including” indicates that the sworn facts supplied by the investigating officer, while necessary, are not sufficient to support an application. Under our statute, it is also necessary for the applicant, under oath, to vouch for the complete set of facts upon which he or she relied in determining whether to seek a wiretap. ¶19

22 ☐ **Salazar's Two Takeaways**

- Application must be under oath
- Attaching the affidavit to the application is not sufficient to fulfill the "recitation of facts relied upon by applicant"
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23 ☐ **THE AFFIDAVIT**

24 ☐ **THE AFFIDAVIT**

- Completed by law enforcement
 - the Affiant(s)
- Affiant must be current Arizona Peace Officer pursuant to A.R.S. § 13-3010(B)(2)
- Federal agents may be cross-designated; make cross-designation is/remains *current*
- All probable cause & exhaustion must be in the four corners of the affidavit

25 ☐ **The Affiant**

26 ☐ **A.R.S. § 13-3010 (A)(1) & (A)(2)**

The Affidavit Has to Established Probable Cause for BOTH of the Following:

-
- A crime has been, is being or is about to be committed.
- Evidence of that crime or the location of a fugitive from justice from that crime may be obtained by the interception.
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27 ☐ **Goals**

A.R.S. § 13-3010(D)(6)

- That the authorization for interception be executed as soon as practicable, that it be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this section and that it terminate upon attainment of the authorized objective or on the date specified, whichever comes first.

28 ☐ **Narrative Section**

- Remember that your reader will not know any background information (this is hard)
- Headings are often helpful to the reader
- Organization is important
 - Various ways to organize
- Watch for staleness
- Items that are important for PC need more detail and discussion
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- 29 ☐ **Telephone Analysis**
 - Evidence of that crime or the location of a fugitive from justice from that crime may be obtained by the interception [A.R.S. § 13-3010(A)(2)]
 - Analysis is case and target specific:
 - Pattern Analysis
 - Frequency Analysis
 - Common Call Analysis
 - Intercepted Communications
 - Who is Target communicating with?
 - Who is Target not communicating with?
 -
- 30 ☐ **Prior Applications**
A.R.S. § 13-3010(B)(5)
 - A full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each application.
- 31 ☐ **Necessity / Exhaustion**
A.R.S. § 13-3010(B)(3)
 - A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.
 - Other Investigative Techniques aka Traditional Investigative Techniques
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- 32 ☐ **Traditional Investigative Techniques**
 - Surveillance / Covert Cameras
 - GPS / Precision Location / Stingrays
 - Search Warrants / Knock and Talks / Vehicle Stops / Consent Searches
 - Pen Register and Trap and Trace / Call Detail Records
 - Trash Runs
 - Undercover Investigations / Informants / Interviews
 - Grand Jury Investigations / Grand Jury Subpoenas
- 33 ☐ **Stingray**
 - Stingray
 - Name given by manufacturer Harris Corp.
 - Copyright
 - Signal Information Collection System

- Name used by Phoenix PD
 - Over the Air Device
 - Name used by DEA
 - Two Uses
 - Located known telephones
 - Identify unknown telephones
- 34 ☐ **Pen Register / Trap and Trace**
- Pen Register: records OUTBOUND digits from a targeted telephone.
 - Trap and Trace: records INBOUND digits to a targeted telephone.
- 35 ☐
- 36 ☐ **Surveillance**
- 37 ☐ **EXHAUSTION EXPLAINED**
- Interception of communications need not be used ONLY as a last resort. The purpose of the requirement is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the judge of the difficulties involved in the use of conventional techniques. The showing must be tested in a practical and commonsense fashion.
 - Courts have acknowledged that wiretapping is particularly appropriate when the investigation shows that the telephone is routinely relied on by the criminal enterprise members to conduct the enterprise's illegal activities
- 38 ☐ **EXHAUSTION EXPLAINED**
- After-the-fact suggestions by defense counsel as to other methods that might have been tried have been rejected by several reviewing courts. That the officers who sought the wiretap had some success with normal procedures after the tap was obtained does not invalidate the issuing Judge's findings.
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- 39 ☐ **BOILER PLATE LANGUAGE**
- *Defense Will Argue:*
 - Affidavit contained only generalized statements re: exhaustion/necessity for WT; or
 - Affidavit failed to explain how the organization/ conspiracy being investigated differed from others
- 40 ☐ **Affidavit Review Process**
- Law Enforcement Agencies will have an internal review process
 - Affidavits will be reviewed by the assigned prosecutor
 - Affidavit will most likely then be reviewed by a committee of prosecutors
 - Judicial Review
 - Labor-intensive, thorough process which takes time

41 ☐ **Corresponding Paperwork**■ Authorization■ Application■ Affidavit■ Findings and Orders■ Service Provider Orders

■ Logistics – Who Keeps What

■ Any ex parte order for interception, together with the papers on which the application was based, shall be delivered to and retained by the applicant during the duration of the interception as authority for the interception authorized in the order. The justice or judge issuing the order shall retain a true copy of the order at all times [A.R.S. § 13-3010(F)].

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42 ☐ **Monitoring**

■ If the intercepted communication is in a code or foreign language and an expert in that code or foreign language is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after the interception (A.R.S. § 13-3010(M)).

■ An interception under this chapter may be conducted in whole or in part by government personnel or by an individual operating under a contract with the government or acting under the supervision of a law enforcement officer who is authorized to conduct the interception [A.R.S. § 13-3010(N)].

43 ☐ **Length of Interception**

■ An order that is entered under this section may not authorize the interception of any wire or oral communication for any period that is longer than is necessary to achieve the objective of the authorization and that exceeds thirty days. This thirty day period begins on the earlier of the day on which the interception actually begins under the order or ten days after the order is signed.

44 ☐ **Listening Devices****A.R.S. § 13-3010(D)(7)**

■ That entry may be made to service, install or remove interception devices or equipment if entry is necessary to effect the interception.

45 ☐ **A.R.S. § 13-3010(L)**

■ Any order authorizing the interception of wire communications pursuant to this chapter is also deemed to authorize the interception of any electronic communication that may be made over the same equipment or by the same facility.

■ Text Messages

■ Fax

■ BB PIN-to-PIN

- Emails?

- Apps?

46 ☐ **Terminology**

- CDMA – Code Division Multiple Access
 - Verizon, Cricket, Sprint
 - ESN - Electronic Serial Numbers
 - Assigned to the device – 805E3E72
 - MSID - Mobile Station Identities
 - Assigned by the Carrier – 2073378901
- GSM – Global System for Mobile Communications
 - AT&T, T-Mobile
 - IMSI - International Mobile Subscriber Identifications
 - Assigned to the SIM card - 310260762433345
 - IMEI - International Mobile Equipment Identities
 - Assigned to the device - 357852035551240

47 ☐ **Terminology**

- LTE – Long Term Evolution
 - Verizon, Cricket, Sprint, AT&T, T-Mobile
 - Standard for Wireless Communication of High Speed Data
 - Based on GSM Standard
- UMTS – Universal Mobile Telecommunications System
 - Based on GSM Standard
- SIM – Subscriber Identity/Identification Module
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48 ☐ **“ROVING” WIRETAPS**

- Roving interceptions are permissible only when the applicant demonstrates that a particular identified individual/individuals can be expected to use numerous telephones or locations to discuss their crimes as a means of evading surveillance.
- The roving wiretap provision requires the application to show and the judge to find that the targeted individual switches telephones for the purpose of thwarting surveillance.

49 ☐ **Jurisdiction to Authorize Wiretap**

- Hypothetical: Judge authorizes wiretap for target in AZ talking to customers in NY. Wire room is in Phoenix. Then target leaves AZ and goes to CA and is talking to customer in NY.
 - Are we authorized to listen to those calls?

50 ☐ **Jurisdiction to Authorize Wiretap**

- Location of the point of interception (wire room) determines jurisdiction to authorize wiretap, but beware—still have to establish jurisdiction for prosecution

- "Interception," under statute authorizing interception of wire, oral, or electronic communications within territorial jurisdiction of the court in which the judge is sitting, occurs where the tapped phone is located and where law enforcement officers first overhear the call. 18 U.S.C.A. §§ 2510(4), 2518(3). U.S. v. Luong 471 F.3d 1107 (C.A.9 (Cal.), 2006).

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51 ☐ **JURISDICTION**

- Article 2, § 24, Arizona Constitution
 - "right to speedy public trial ... county in which the offense is alleged to have been committed
- Venue, or place of trial, is a jurisdictional requirement in a criminal case. State v. Agnew, 132 Ariz. 567 (App.Div.2, 1982)
- Venue is *not* an element of the crime. State v. Willoughby, 181 Ariz. 530 (Ariz. 1995)
- The State proves venue by preponderance of the evidence. State v. Mohr, 150 Ariz. 564 (App.Div. 1 1986)

52 ☐ **So, You Are Ready to Do a Wire**

- Manpower
 - Affiant/s
 - Line Investigators
 - Search Warrant Writer
 - Surveillance Officers
- Minimization Meeting
 - General Minimization Guidelines
 - Privileges
 - Attorney – Client
 - Husband – Wife
 - Clergy – Parishioner
 - Doctor - Patient

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53 ☐ **Minimization**

- ☐ 2 ■ Three factors determine objective reasonableness of minimization attempt:
 - 1) investigation's nature & scope;
 - 2) government's reasonable expectations of the conversations' character;
 - 3) the extent of judicial supervision over the surveillance.
- Totality of the circumstances determine reasonableness of the minimization attempts
- State v. Ring, 25 P.3d 1139 (Ariz.2001)

54 ☐ **Judge's Reports**

(A.R.S. § 13-3010(K))

- The order may require written reports to be made to the issuing judge at specified

intervals showing the progress made toward achieving the authorized objective and the need for continued interception.

- Report the statistics (pertinent, non-pertinent, minimized, privileged)
- Tell the judge what is occurring (over the phone, surveillance, etc.)
- Report any exception incidents (seizures, identifications, burns, etc.)
- Report any technical issues (problems with intercept system / malfunctions)
- Report how issues were resolved
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55 ☐ **Amended Affidavits / Spins**

- Can be for additional lines / Additional Targets / Additional Crimes
- Previous Affidavits / Judges Reports Incorporated by Reference
- Ensure Amended (Spin) contain additional information and do not contain boiler plate language
- For Additional Targets Necessity/Exhaustion must be shown
- Include other additional / new information

56 ☐ **Extensions**

- If the application is for the extension of an order it must contain:
 - a statement setting forth the results thus far obtained from the interception, or
 - a reasonable explanation of the failure to obtain such results.
 - Must comply with the statute relative to an original application.
- The court may grant extensions of any order if an application for an extension is made pursuant to subsection A and the court makes the findings required by subsection C. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and shall not exceed thirty days.

57 ☐ **WIRE INVESTIGATION**

58 ☐ **Attention to detail – everything matters**

59 ☐ **Surveillance**

- The most under appreciated job related to a wiretap investigation, but the most important
 - Surveillance confirms the over act
 - Surveillance leads to seizures
 - Surveillance leads to the identification of co-conspirators

60 ☐ **Surveillance Reports**

- Organization of surveillance reports is critical
 - Case agent should have deadline for surveillance reports to be turned in
 - Reports can be written by each person on surveillance
 - Reports can be written by one person for everyone, but beware

61 ☐ **Examples of Detailed Surveillance Reports**

62 ☐

63 ☐64 ☐65 ☐66 ☐67 ☐ **Strategizing**

- Seizures
 - How many
 - From whom
 - What affect on investigation?
- Arrests/Search Warrants
 - One person to each location with knowledge of the case
 - Interviews of suspects

68 ☐ **End of Interception Procedures**
A.R.S. §§13-3010 (G) & (H)

- Sealing of Disks
- Return of Paperwork to the Court
- Return of Disks to the Court
- Termination Petition and List of Items Returned to the Court
- Notification of People Intercepted
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69 ☐ **Sealing of Disks**

- A.R.S. § 13-3010 (H) If possible, the contents of any communication that is intercepted by any means authorized by this section shall be recorded on any tape, electronic, wire or other comparable device. The recording of the contents of any wire, electronic or oral communication under this subsection shall be done in such a way as will protect the recording from editing or alterations. Within ten days after the termination of the authorized interception, the recordings shall be made available to the judge who issued the order and shall be sealed under the judge's directions. Custody of the recordings shall be maintained pursuant to court order. The recordings shall be kept for ten years and shall not be destroyed except on an order of the issuing judge or another judge of competent jurisdiction.
- BUT—Beware Recent Litigation

70 ☐ **Sealing of Paperwork**

- A.R.S. § 13-3010 (G) Within ten days after the termination of the authorized interception, applications made and orders granted under this section shall be returned to and sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. The applications and orders shall be disclosed only on a showing of good cause before a judge of competent jurisdiction or as otherwise provided.

71 ☐ **Notification**

A.R.S. § 13-3010(I)

- Within ninety days after an application under subsection A is denied, or the period of an order or any extension expires, the issuing or denying judge shall serve the persons named in the order or application and any other parties to the intercepted communications as the judge may determine the interests of justice require with an inventory, including notice of all of the following:
 - The fact of the entry of the order or the application.
 - The date of the entry and the period of authorized interception, or the denial of the application.
 - The fact that during the period of authorized interception wire, electronic or oral communications were or were not intercepted. On motion, the judge may make available to the person or the person's attorney for inspection such portions of the intercepted communications, applications and order as the judge determines to be in the interest of justice. On an ex parte showing of good cause to the judge, the serving of the notice required by this subsection may be postponed.

72 ☐ **Prosecution of the Wire — Roadmap**

- Charging Notebooks
- The Indictment
 - When? Takedown or indictment first?
 - Charges and dates determine what comes in at trial
 - Grand Jury presentation
- Form IVs / PC statements / IA Sheets / *Nebbia* motions
- Discovery
 - Organization: Index, Bates
- Show & Tells
- Plea Agreement Considerations
- Defense Interviews
- Settlement Conferences
- Litigation

73 ☐ **Pre-Indictment Organization**

74 ☐ **CHARGING NOTEBOOKS**

Make sure you have all affidavits, applications, search warrants, ten day reports, etc. for the wiretap

75 ☐ **CHARGING NOTEBOOKS**

Obtain all agency reports

76 ☐ **SHOW ME THE DISCOVERY!**

Make sure your evidence is not compromised

77 ☐ **SHOW ME THE DISCOVERY!**

Obtain the DVDs/Blu-rays for all wiretap lines

78 ☐ **SHOW ME THE DISCOVERY!**

79 ☐ **SHOW ME THE DISCOVERY!**

Attempt to create a witness list

80 ☐ **TO CHARGE, OR NOT TO CHARGE. THAT IS THE QUESTION...**

Think about what the defense will likely be

81 ☐ **TO CHARGE, OR NOT TO CHARGE. THAT IS THE QUESTION...**

Think about what the defense will likely be

82 ☐ **TO CHARGE, OR NOT TO CHARGE. THAT IS THE QUESTION...**

Think about what the defense will likely be

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84 ☐

85 ☐

86 ☐

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89 ☐ **Typical charges to consider**

■ Conspiracy--A.R.S. §13-1003

■ Illegally Controlling/Conducting an Enterprise--A.R.S. §13-2312

■ Offer or a Completed Offense-- A.R.S. §13-3405(A)(4), 13-3407(A)(7), 13-3408(A)(7)

■ Attempt, Solicitation, Facilitation-- A.R.S. §13-1001, 13-1002, 13-1004

■ Money Laundering-- A.R.S. §13-2317

■ Wire Communication--A.R.S. §13-3417

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90 ☐ **LESS IS MORE!**

Charge by event

91 ☐ **THE BOTTOM LINE**

Consider each defendant individually

92 ☐ **SEE YOU AROUND TAKEDOWN**

■ Determine if and when there will be a takedown

- Options
 - Pre-indictment takedown
 - PC arrest
 - Holding complaint for arrest warrant
 - Cannot present wiretap evidence at a preliminary hearing, Dunlap v. Superior Court, In and For County of Maricopa, 169 Ariz. 82, (Ariz.App.1991)
 - Post-indictment takedown

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93 ☐ **SEE YOU AROUND TAKEDOWN**

Pre-indictment takedown

94 ☐ **SEE YOU AROUND TAKEDOWN**

Pre-indictment takedown

95 ☐ **SEE YOU AROUND TAKEDOWN**

Post indictment takedown

96 ☐ **SHOW YOUR HAND**

- "Show and Tell"
 - after disclosure, have defense counsel come in for an *informal* interview with LE to highlight evidence against his client (not Rule 15 interview)
- Narrows the focus of the defense attorney
 - Helps with early pleas, faster resolution
- Organization of disclosure
 - Chronological
 - Defendant-specific or offense-specific

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99 ☐ **THE COOPERATING DEFENDANT/WITNESS**

- Post-Free Talk:
 - Extend plea with cooperation language if testimony is required
 - Include provision waiving time for sentencing
 - Disclose free talk once the defendant has accepted the plea

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100 ☐

101 ☐

102 ☐103 ☐104 ☐105 ☐ **Franks v. Delaware**

- Defense will argue that in the WT affidavit, the affiants:
 - Intentionally or knowingly made a false statement, or
 - Recklessly disregarded the truth; and
 - A hearing is necessary

106 ☐ **Franks v. Delaware**

- 2 ■ However, NO EVIDENTIARY HEARING UNLESS:
 - Allegations are more than conclusory
 - Alleged violations are material
 - Defense provides an offer of proof

107 ☐ **Defense Tactics**

- Expert testimony—
 - Defense attorneys are requesting Daubert hearings re: whether our detectives/agents are experts in coded drug language
 - AZ Rules of Evidence 702 governs Testimony by Expert Witnesses
 - Court can apply Rule 702 to all expert testimony, not just “scientific” testimony

108 ☐ **Defense Tactics**

- Expert Testimony
 - Court will look to the following factors in a Daubert hearing regarding experience based expert testimony. Whether:
 - The expert’s technical and specialized knowledge and examination will help the jury determine a fact in issue
 - The expert’s testimony is based upon sufficient data
 - The expert’s testimony is the product of reliable principles and methods—i.e.
 - Did the expert first hear these words in this investigation?
 - Was his opinion regarding the interpretation of the intercepted communications based on his subjective belief that the defendants and co-conspirators are drug dealers?
 - In U.S. v. Hermanek, 289 F.3d 1076 (9th Cir. 2002) the expert interpreted the cryptic language as referring to cocaine simply because he believed the defendants to be cocaine traffickers—such circular, subjective reasoning does not satisfy the Rule 702 reliability requirement.

109 ☐

110 ☐ **ASSEMBLING THE BINDER**

- Wire calls
 - Prepare a master binder with all the transcripts of all calls to be used at trial
 - Prepare judge, defense, interpreter, and juror binders with transcripts of calls to be used at trial – PREPARE WELL IN ADVANCE
 - Prepare a separate wire binder for the clerk to be marked as an exhibit (check with your clerk)

111 ☐ **ASSEMBLING THE BINDER**

- Photographs
 - Prepare a master binder with color photographs of the exhibits to be used at trial
 - If possible, present digital images on the projector screen for viewing at trial
- Other paper exhibits
 - Prepare a master binder with other exhibits to be used at trial
- ORGANIZATION IS CRITICAL FOR SUCCESS
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112 ☐

113 ☐

114 ☐ **PRETRIAL LITIGATION – EARLY**

- Judicial determination of admissibility
 - Detailed facts of your case
 - Identify evidence State intends to introduce *and* the legal basis of admissibility of evidence
 - cell phone records; toll records; GPS records
 - cell phone downloads
 - bank / financial records
 - video surveillance
 - wage queries
 - jail calls
 - drug ledgers
 - Know hearsay exceptions – business records, etc.

115 ☐ **PRETRIAL LITIGATION – EARLY**

- File pretrial motions to establish a pretrial procedure (pursuant to Rule 104) for the admissibility of:
 - Wiretap evidence
 - audio
 - Transcripts

- Prevent challenges to accuracy of translation
- Voice identification
- Expert witness testimony re: coded language
- Expert witness testimony re: modus operandi of drug traffickers / money launderers

116 ☐ **PRETRIAL EVIDENTIARY HEARINGS**

- Determination of foundation for calls
 - Affidavit(s) of electronic surveillance analyst from service providers re: supervision and processing of court interception orders
 - Affidavit(s) of affiants re: minimization, no alterations, audio reviewed later was identical to audio at interception, sealing, etc.
 - Affidavit(s) of technical administrator re: equipment functioning correctly
-

117 ☐

118 ☐ **Pretrial Litigation – Early!!**

- Memorandum of Law
 - Educate your judge on elements of law and sufficiency of evidence
 - Conspiracy
 - Criminal Enterprise
 - Accomplice Liability
 - Include fact scenarios that *upheld* convictions
 - Motion(s) in Limine
 - Preclude irrelevant evidence
 - Motion(s) to Produce Disclosure
 - Rule 15 applies equally to the defense – prevent ambush

119 ☐ **Trial Preparation – Early!!**

- Jury Instructions
 - Definition of racketeering includes punishment in jail of at least one year – jury reads this??
 - Deliberate ignorance
 - Destruction of evidence / flight
 - Anti-Willits argument
- Forms of Verdict
 - Identify object(s) of conspiracy
 - Racketeering acts
 - Threshold interrogatories
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120 ☐ **Proving the Conspiracy**

- Conspiracy is an *inchoate* offense. It is unnecessary to prove the commission of the object crime, so long as there is an agreement to commit the offense and an overt act. *State v. Newman*, 141 Ariz. 554 (1984); *State v. Gessler*, 142 Ariz. 379 (1984); *State v. O'Brien*, 123 Ariz. 578 (Ariz. App. 1979).
- Criminal conspiracy need not be, and usually cannot be, proved by direct evidence; the common scheme or plan may be inferred from circumstantial evidence. *State v. Arredondo*, 155 Ariz. 314 (1987); *State v. Avila*, 147 Ariz. 330 (1985).

121 ☐ **Proving the Conspiracy**

- Where an indictment charges a single conspiracy with multiple objects, it is sufficient if the prosecution proves the defendant guilty of conspiring to commit any one of the objects. *State v. Ortiz*, 131 Ariz. 195 (1981), *cert. denied*, 456 U.S. 984
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- The existence of an unlawful agreement can be inferred by overt conduct of the parties. *State v. Hall*, 129 Ariz. 589 (1981); *State v. Stein*, 153 Ariz. 235 (Ariz. App. 1987); *State v. Estrada*, 27 Ariz. App. 38 (1976)

122 ☐ **Overt Act Requirement**

- The crime of conspiracy is complete when an overt act is committed. *State v. Newman*, 141 Ariz. 554 (1984)
- Proof of the conspiracy is sufficient if only one of the parties commits an act in furtherance of a goal of the conspiracy. *State v. Green*, 116 Ariz. 587 (1977); *State v. Olea*, 139 Ariz. 280 (Ariz. App. 1983); *State v. Aguirre*, 27 Ariz. App. 637 (1976)
- Where an indictment charges a single conspiracy with multiple objects, it is sufficient if the prosecution proves the defendant guilty of conspiring to commit any one of the objects. *State v. Ortiz*, 131 Ariz. 195 (1981), *cert. denied*, 456 U.S. 984

123 ☐ **Overt Act Requirement**

- Even though the indictment alleges multiple overt acts, there need only be proof of one act in furtherance of the conspiracy. *State v. Olea*, 139 Ariz. 280 (Ariz. App. 1983); *State v. Verive*, 128 Ariz. 570 (Ariz. App. 1981)
- A person who *knowingly* does any act to further the object of a conspiracy, or otherwise participates therein, is criminally liable as a conspirator. *State v. Arredondo*, 155 Ariz. 314 (1987)
- Any one act by one or more of the co-conspirators may be attributed to all of the members of the conspiracy. *State v. Dupuy*, 116 Ariz. 151 (1977); *State v. Olea*, 139 Ariz. 280 (Ariz. App. 1983)
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124 ☐ **Defeating *Mere Presence* Defense – Overt Act Doesn't Have to be Criminal**

- Any action sufficient to corroborate the existence of the agreement and to show that it is being put into effect is sufficient to support the conspiracy. *State v. Arredondo*, 155

Ariz. 314, 746 P.2d 484 (1987)

- A person may be guilty of conspiracy, even though he has limited knowledge as to the scope of the conspiracy and no knowledge or details of the plan of operation in furtherance thereof, or the membership in the conspiracy or part played by each member and division of the spoils. However, the defendant must know the general purpose of the conspiracy. *State v. Nightwine*, 137 Ariz. 499, 671 P.2d 1289 (Ariz. App. 1983).

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125 ☐ **Prima Facie**

Showing of Conspiracy

- For co-conspirator statements to be admitted, there must be a prima facie showing, independent of the hearsay, of the existence of the conspiracy and the defendant's and declarant's participation therein. *State v. Martin*, 139 Ariz. 466 (1984); *State v. Baumann*, 125 Ariz. 404 (1980); *State v. Fletcher*, 137 Ariz. 306 (Ariz.App. 1983)

- Beware: Proof of the existence of the conspiracy need not precede proof of the co-conspirator declarations; the order of proof is within the trial court's discretion. *State v. Martin*, 139 Ariz. 466 (1984); *State v. Fletcher*, 137 Ariz. 306 (Ariz. App. 1983).

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126 ☐ **Proving the Criminal Enterprise**

- Based on Federal RICO
- State must allege and prove:
 - Commission of predicate racketeering act
 - By each defendant
- Not duplicious even though an element of criminal enterprise is separately indictable
 - Unreported opinion approving inconsistent verdicts where Def. convicted of racketeering but acquitted of the alleged predicate – *State v. Grabinski*, 2009 WL 1531020; *State v. Gilkes*, 2011 WL 1086606
 - consecutive v. concurrent sentencing

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127 ☐ **Criminal Enterprise**

- Existence/Operation of the enterprise
 - Essential element of criminal enterprise
 - Location of enterprise in Arizona provides jurisdiction when other elements of offense(s) occur out-of-state – *State v. Baines*, 142 Ariz. 145 (App. 2, 1984)
- A customer can be "associated with" an enterprise under Arizona RICO
 - Direct or indirect participation in the conduct of the enterprise – *State v. Petzoldt*, 172 Ariz. 272 (App. 2, 1992)

128 ☐